WM. CLARK KENNEDY - Originator
R.W. PICKRELL
WM. E. EUBANK } Concurred
FRANK SAGARINO



Opinion No. 62-29
R-227

August 10, 1962

REQUESTED BY: Hon. L. Alton Riggs
State Representative

OPINION BY: Robert W. Pickrell
The Attorney General

QUESTIONS: 1. What is the obligation of the City of Tempe, as a political subdivision of the State of Arizona, concerning reemployment of a city employee who, as a member of the National Guard, enters on active duty with the military services of the United States pursuant to the proper orders of the Governor and who, upon his return and release from such duty, promptly requests restoration to his former position?

2. In connection with Question No. 1, what is the further effect upon the rights of the guardsman and the City as a result of the following:

(a) The fact that the guardsman volunteered to attend a training school operated by the regular military establishment and attends as part of his national guard duties;

(b) Failure by the guardsman to formally request a leave of absence;

(c) Failure or refusal by the City to grant a leave of absence for this purpose;

(d) Failure at the time of leaving by the guardsman to clearly express his desire to return to city employment on termination of military duty;

(e) The guardsman's being informed by the City that in his absence his job must be filled by another and the failure of the guardsman to protest it;

(f) Withdrawal by the guardsman of his State Retirement contribution upon his entry on active duty and his statement in his application to the State Retirement Board that he has terminated employment with the City of Tempe.

(g) Failure by the guardsman while on active duty to make inquiry respecting his reemployment rights or to notify the City of his desire for reemployment;

(h) The city's necessity for filling the guardsman's job with another during the guardsman's absence; and

(i) Demand by the guardsman upon his return that the City restore him to the exact job he left and his refusal to accept a comparable job with equal pay and status.

CONCLUSIONS: 1. "A member of the National Guard shall not lose seniority or precedence while absent under competent military orders. Upon return ... the employee shall be returned to his previous position, or to a higher position commensurate with his ability and experience as seniority or precedence would ordinarily entitle him." (A.R.S. § 26-168(B), 1956). The restoration must be promptly made. The City is liable to the guardsman for his salary subsequent to his request for reemployment.

2(a) There is no distinction between the guardsman's voluntarily or involuntarily entering on active duty, so long as he is serving under competent military orders.

(b) The leave of absence from his employment to enter into military service is given to the guardsman by A.R.S. § 26-168(A) and a failure to make a formal request of his employer to take this leave of absence does not impair his right to reemployment.

(c) The City may not refuse to grant leave;

(d) The guardsman need not express any intent to return to his employment as a condition to asserting his reemployment rights.

(e) The filling of the guardsman's job in his absence does not affect his reemployment rights.

(f) Withdrawal of the retirement contributions and statements made in connection therewith do not affect the guardsman's reemployment rights.

(g) There is no duty on the part of the guardsman to request reemployment while he is in the military service or make inquiry regarding his rights thereto. The guardsman must assert his rights within a reasonable time after leaving active duty.

(h) Persons employed by political subdivisions of the state to fill the jobs of employees absent in the military service held their jobs contingent upon the return of the guardsman (A.R.S. § 38-297, 1956).

(i) The political subdivision discharges its duty to the returning guardsman if, in a situation where it is unable to restore him to his previous position for some reason beyond the control of the City, they employ him in a position of comparable opportunity, seniority and precedence. The guardsman's right is to be returned to his previous position or to a higher position commensurate with his ability and experience such as seniority or precedence would have entitled him had there been no military interruption, unless the guardsman accepts a comparable position and waives this right.

Analysis and Reasoning:

We have paraphrased your original question in order to cover the reasonable implications thereof.

National guardsmen, for the purpose of this opinion, include members of the Arizona Air National Guard and is confined to personnel of those units described in A.R.S. § 26-154. It does not discuss or consider the rights of the public employees who may be members of the various reserve components of the United States Army, Navy or Air Force, nor the unorganized or organized state militia. In the course of the opinion we will discuss the effect of some statutes which apply solely to other elements or other members of the armed forces, but do not intend this opinion to be considered as controlling thereon.

From time to time the State Legislature has passed statutes respecting reemployment rights of returning service personnel. There is no necessary connection between them except as to the rule of construction of statutes of pari materia must be considered. The statutes, other than the national guard statutes, are: §§ 9-971; 38-297; 38-298; 38-299; 38-610; 38-741(13); 38-746(B); 38-~~748~~738(E); A.R.S. 1956.

A.R.S. § 38-297 has a limited bearing on the case covered by this opinion as respects the right and duty of the municipality:

> "§ 38-297. Vacancy resulting from military service; notice to appointee
>
> When a vacancy exists through the induction or order of a public officer or employee described in § 38-298 into the armed forces of the United States, the appointing or employing authority shall inform any person appointed to fill the vacancy that his tenure, apart from other considerations, is contingent upon restoration of the former officer or employee as provided in § 38-298."

The rights of the national guardsman to reemployment are to be derived from Article 3, Chapter 1, Title 26, A.R.S., 1956, all applicable Federal laws, and A.R.S. § 38-297 as it affects persons employed by political subdivisions to fill vacancies created by military service.

This opinion relates to the rights of guardsmen-employees of the political subdivisions of the State. By incorporating the Federal law into the State law, the Legislature intended to implement the national policy to encourage voluntary enlistment. Thus, where the Federal law is not incompatible with the state law respecting public employees, national guardsmen have also all rights under the Federal laws and under state laws. A.R.S. § 26-151(B) incorporates by reference into the state law of Arizona all acts of Congress and amendments thereto insofar as they apply to national guards of the states. We consider this as incorporating into the state statutes all pertinent provisions of the Universal Military Training and Service Act (Title 50 U.S.C.A., App. 459) and Selective Service Acts. Congress excluded from the mandatory application of the Federal law employees of the political subdivisions of the states. It set forth its intention as follows in the hope the states would adopt a similar policy:

"§ 459. Separation from service * * * Reemployment rights

* * *

(C) if such position was in the employ of any State or political subdivision thereof, it is ~~hereby~~ declared to be the sense of the Congress that such person should--

(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of the employer, be restored to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case." (Emphasis supplied.)

Under our State statute (§ 26-151(B)), all Federal, state and municipal legislation must be considered in determining the rights of the returning serviceman. Smith v. Little Rock Civil Service Commission, 218 S.W. 2d 366 (Arkansas statute, 1947, anno. § 12-2313). The effect of the Arizona statute is to incorporate by reference the Federal law as respects returning servicemen, and to adopt as the law of Arizona the "sense" of the Congress.

The history of the statutes respecting the Arizona National Guard makes it clear that from the time of the establishment of the National Guard it was the intent and purpose of the Legislature to secure to the National Guard every advantage given by the Federal government and in addition to secure additional advantages by the State in order to promote and secure voluntary enlistment in the National Guard and to this end protect the employment status of national guardsmen while absent on military duty. Par. 9, Ch. 85, L.1912; amended Ch. 144, L.1921; Sec. 2200, R.C. 1928, Chapter 60, Session Laws of 1929, enacted a comprehensive amendment to the Revised Code of 1928 to conform the National Guard statutes to the National Defense Act. At that time there were no state statutes in Arizona granting any specific reemployment rights to members of the armed forces. (R.S. 1928, Sec. 2234 did not cover reemployment.) After the enactment

of this statute, the Legislature, during the Second World War, passed the reemployment statutes (Ch. 29, L. 1944, 2nd Spec. Sess.) which now appear as §§ 38-297, 38-298 and 38-299, A.R.S. At that time they dealt with the National Guard as well as other components of the armed services, but were confined in their effect to personnel who had engaged in war. Chapter 95, Session Laws of 1952, repealed Chapter 60, Laws of 1929, and substituted a comprehensive enactment of the present national guard statutes under Title 26. It is under this Act that the present rights of reemployment for members of the National Guard are to be measured.

The National Guard is then placed on a different footing than are members of those elements of the armed forces who are not part of the National Guard. A.R.S. §26-~~127~~ 167, reads as follows:

> "A member of the national guard shall not, because of . . . absence from employment under competent military orders, be deprived of employment . . ."

Section 26-168(C) was retained from the 1929 Code, and to this was added the following sections:

> "A. An employer shall not refuse to permit members of the national guard to take leaves of absence from employment for the purpose of complying with competent orders of the state or United States for active duty, . . .
>
> B. A member of the national guard shall not lose seniority or precedence while absent under competent military orders. Upon return to employment the employee shall be returned to his previous position commensurate with his ability and experience as seniority or precedence would ordinarily entitle him." (Emphasis supplied)

The policy of these statutes and the Federal statutes is unequivocally that of promoting the recruiting and expansion of the military forces of the United States, its citizens' army, and particularly to protect and encourage the voluntary enlistment in the National Guard. Selective Service Training Act, 1940, Section 8; 50 U.S.C.A., App. 308 and 459; Hanebuth v. Patton (Colo.), 170 P.2d 526; People ex rel v. Sischo (Cal. App.), 144 P.2d 785, 158 A.L.R. 1431.

Prior to the enactment of the special statutes in Title 38 cited above, and the enactment of the present Title 26, our Supreme Court had decided the case of Perkins v. Manning, 59 Ariz. 60, 122 P.2d 857 (1942). This case held that the calling to active duty of the national guardsman and

the entry on this active duty by the State Superintendent of Health as a Major in the National Guard, resulted in the state officer concerned occupying a Federal office incompatible with the state office of Superintendent of Health. The court held that the office was vacated, ipso facto. Our Legislature, apparently considering this decision, enacted what is now Sections 38-297 to 38-299, inclusive.

The true rule, then, seems to be that an appointive public officer or employee, absent on military duty, leaves a vacancy in the sense that he is required to give up the emoluments and possession of the public office and his occupancy thereof is suspended while he is engaged in active military duty. He retains, however, a right to be restored to that office or to such higher office as the statutes and his abilities entitle him upon the termination of his military service. Clopton v. Sharrenberg (Cal.), 235 P.2d 84; §§ 38-297, 26-168(B), A.R.S. We are not here discussing rights of elective officers of the state or its subdivisions.

The Federal statutes have considered that a veteran is on equal footing whether he volunteers or is inducted. How he enters the military service does not affect his rights of restoration to employment. Liberal construction is given to the Federal statuces for the benefit of those who leave private life to serve their country. Boone v. Fort Worth & Dallas R.R. Co. (Tex., C.A.), 233 F.2d 766.

Where a private employer has wrongfully refused to restore a discharged serviceman to the same or comparable position, upon a reasonable and timely application, Federal courts have not hesitated to grant damages. Dodds v. Williams (D.C. Ariz.), 68 F.Supp. 997.

The act of enlisting in the National Guard is contractual in nature resulting in employment of the enlisted man by the state. Andrews v. State (1939), 53 Ariz. 475, 90 P.2d 995. Statutes governing the control of the political subdivision of the State of Arizona as respects their employees and the rights of reemployment given to the serviceman are a part of that contract. Pinal County v. Hammons, 243 P. 919, 30 Ariz. 36 (1926). The state political subdivisions are just as obligated to honor them as any other contractual obligation. The word "employee" as used in Section 26-168(A) and (B) is not confined to private employees but includes the public employees as well. Section 38-297, which permits political subdivisions to hire replacements and fill the vacancies of guardsmen, requires them to employ the replacement on a contingent basis.

It is our conclusion, therefore, that the City of

Tempe was obligated to restore promptly a member of the National Guard who, in this case, made his application therefor within a reasonable time after return from military duty.

The point has been raised that the guardsman whose situation prompted this request for an opinion, when he entered on active duty, withdrew his retirement benefits from the State Retirement Fund and signed a statement that he had terminated his employment with the state. We consider this act to be immaterial. In a similar instance, the Michigan Supreme Court had this to say:

> "The statute does not make the right to its benefits dependent upon how a public employee separated himself from his employment to perform military duty. It simply applies its beneficent provisions to 'any public employee who leaves a position . . . to perform military duty.' The statutory language covers plaintiff's situation regardless of whether he resigned or took leave of absence. No board resolution or city charter provision can supersede it . . ." Borseth v. City of Lansing, Mich., 61 N.W. 2d 1932 (1953).

In interpreting the Federal laws, the United States Department of Labor, in its "Reemployment Rights Handbook", October, 1954, page 103, question 425, specifically states that a withdrawal of a pension fund accumulation on leaving employment to enter military service does not constitute a waiver of reemployment rights under the Federal law and no written contract containing such a withdrawal of contributions would be effective. Military service is generally considered as not being a basis for an arbitrary termination of the state retirement program. A.R.S. §§ 38-741(13), 38-746(B), 38-758(E), 1956. The withdrawal by a serviceman of his contributions in the State Retirement System upon entering the military service cannot operate to defeat the serviceman's rights of reemployment.

Under the Federal laws, 50 U.S.C.A., App. 459(B) and (C), the returning serviceman is to be restored to his original position or to a position of like seniority, status and pay. This has been interpreted in the Federal law to preclude the serviceman from demanding the return of the serviceman to his exact position. Shwetzler v. Midwest Dairy Products Corp., 174 F.2d 612; Bora v. General Mills, Inc., 173 F.2d 138.

Here, however, the state and Federal statutes differ. A.R.S. § 26-168(B) gives to the returning employee the right to be "returned to his previous position or to a higher position commensurate with his ability and experience and as

seniority or precedence would ordinarily entitle him." Unless some factor completely beyond the control of the city would arise to completely eliminate the position, the city's duty is clear. Adoption of a merit system ordinance by the city is not such a circumstance. The State Legislature intended that the national guardsman be given a preferred status in his reemployment rights in order to encourage voluntary enlistment in the state's military body as distinguished from the Federal. Therefore, it is our opinion that this statute gives a mandatory right to a national guardsman to his original job unless he waives with full knowledge of his rights his entitlement to his exact position.

The City of Tempe, as a municipal corporation, is further liable for the payment of the salary of the serviceman between the time that he made his demand for employment and was reemployed by the city. The state statutes respecting the National Guard are a part of every contract made between guardsmen and the city and the statute need not be included in an employment contract before this effect takes place. Pinal County v. Hammons, 243 P. 919, 30 Ariz. 36 (1926). A city employee wrongfully discharged may in a mandamus proceeding be reinstated in his employment and recover both his position and his salary less any amount he is able to earn while unemployed. City of Phoenix v. Powers, 57 Ariz. 262, 113 P.2d 353 (1941).

The Federal law has clearly given a right in damages to the serviceman when he is denied employment. We think the same rule would be applied in the event of an action brought by a returning serviceman against a municipality. Kent v. Todd Houston Shipbuilding Corp. (D.C. Tex. 1947), 72 F.Supp. 506; Isang v. Kan (C.A. Cal. 1949), 173 F.2d 204, cert.den. 69 S.Ct. 1515, 93 L.Ed. 1744. Wrongful refusal to reemploy is tantamount to wrongful discharge and the city is liable for the salary of the position to which the guardsman should be restored less any amounts earned during the period awaiting restoration or reemployment.

We therefore conclude that the City of Tempe should restore the national guardsman to his position and pay him his salary less the amounts earned in the interim period awaiting the city's decision.

Robert W. Pickrell

ROBERT W. PICKRELL
The Attorney General

RWP:lf
R-227